SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 700

UNITED STATES OF AMERICA,
Appellant,

vs.

RAY S. FISHER,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

REPLY MEMORANDUM OF RAY S. FISHER ON MOTION TO DISMISS OR AFFIRM

LORENTZ AND STAMLER,
Attorneys for Appellee, Ray S. Fisher,
11 Commerce Street,
Newark 2, New Jersey.

JOSEPH H. STAMLER,
Of Counsel.

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The Solicitor General has filed a Memorandum on behalf of the United States in opposition to the Motion to Dismiss or Affirm. His answering memorandum is limited solely to the issue of timeliness.

A brief reply is necessary because of what appears to be a concession in the Memorandum of the Solicitor General. We have this day spoken to the Deputy Clerk of the

Supreme Court of the United States who advises us that the original Order signed by the Court below on July 21, 1965 has noted in the upper left hand corner a stamp stating that the original order was filed at 10:40 A.M. on July 23, 1965. (On our copy which is before me at the time this Brief is written, the stamp of the Clerk appears as "Original filed July 21, 1965.")

The appellant concedes that its "appeal would be untimely if the day of filing controls". (Answering Memorandum of Solicitor General, p. 4, note 5.)

Therefore appellant finds itself forced to rely on the ministerial notation of the Clerk made on July 26, 1965. The appellant cites no case to support its position and attempts to draw an analogy from the Rules of Civil Procedure.

Such analogy is inappropriate. The Federal Rules of Civil Procedure recognize that the appeal is most frequently taken from a judgment signed by the Clerk of the Court. (See 1965 Supplement Volume 6, *Moore's Federal Practice*, 2nd edition, Section 58.02, page 105.) In civil cases the final judgment from which an appeal may be taken under Rule 58 may and is in most cases a document signed by the Clerk and not the Judge. This is not so in a judgment in a criminal matter, for in criminal causes the judgment is signed by the Judge and not by the Clerk. As was said in *U. S.* v. *Hark*, 320 U. S. 531, at 534:

> "The judgment of a Court is the judicial determination or sentence of the Court upon a matter within its jurisdiction. No form of words and no peculiar formal act is necessary to evince its rendition or to mature the right of an appeal."

And further in *Hark, supra,* this Court said at p. 534:

> "Where, as here, a formal judgment is signed by the judge, this is prima facie the decision or judgment rather than a statement in an opinion or a docket entry."

Rule 58 of the Federal Rules of Civil Procedure specifically notes what shall be contained in a judgment and refers to Rule 79 which defines the "civil docket". No such comparable Rule appears in the Rules of Criminal Procedure.

The Government takes a position that the ministerial entry by the Clerk on July 26, 1965 should be the governing date for beginning its calculation of time within which to appeal. We respectfully call the Court's attention to the fact that the Notice of Appeal filed by the Government in this case was marked filed on August 25, 1965 but the Clerk did not note its entry on the docket until August 27. Therefore, if the Government is successful in persuading this Court that the Clerk's ministerial docket entry is the all important date, then the appeal is still out of time for the docket entry on the filing of the Notice of Appeal was not made until Friday, August 27, 1965. We do not believe it should be left for the Clerk to determine when a right of appeal in a criminal matter should arise. If it is to be the Clerk's entry on one side of the time period, as the Government argues it should be, then it must be the Clerk's entry on the other end of the time period.

As was said by this Court in *U. S. v. Healy*, 376 U. S. 75, 80:

> "No persuasive considerations of policy dictate a deviant standard for government appeals."

If uncertainty and confusion arise in this case, it has been caused by the failure of the Government to act in timely fashion. If there are doubts created, they should be resolved in defendant's favor. The only way to eliminate uncertainty and confusion which may arise as a result of the Government's position in the case at bar is to hold that the date *when the Judgment is signed by the Court and is filed* governs the beginning of the time period and the day when the Notice of Appeal *is filed* governs the termination of the time period.

We respectfully submit that the Motion to dismiss the appeal be granted.

Respectfully submitted,

LORENTZ AND STAMLER,
Attorneys for Ray S. Fisher, Appellee.
By JOSEPH H. STAMLER,
A Member of the Firm.